

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID NATHANIEL ROBERTS,
Plaintiff,
v.
PLRA,
Defendant.

No. 2:23-cv-0519 AC P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with this civil action and seeks leave to proceed in forma pauperis under 28 U.S.C. § 1915(a).

I. Three Strikes Analysis

The Prison Litigation Reform Act of 1995 (PLRA) permits any court of the United States to authorize the commencement and prosecution of any suit without prepayment of fees by a person who submits an affidavit indicating that the person is unable to pay such fees. However,

[i]n no event shall a prisoner bring a civil action or appeal a judgement in a civil action or proceeding under this section if the prisoner has, on 3 or more occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). The plain language of the statute makes clear that a prisoner is precluded

1 from bringing a civil action or an appeal in forma pauperis if the prisoner has brought three
2 frivolous actions and/or appeals (or any combination thereof totaling three). Rodriguez v. Cook,
3 169 F.3d 1176, 1178 (9th Cir. 1999).

4 “[Section] 1915(g) should be used to deny a prisoner’s [in forma pauperis] status only
5 when, after careful evaluation of the order dismissing an action, and other relevant information,
6 the district court determines that the action was dismissed because it was frivolous, malicious or
7 failed to state a claim.” Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2005). Dismissal counts
8 as a strike under § 1915(g) “when (1) a district court dismisses a complaint on the ground that it
9 fails to state a claim, (2) the court grants leave to amend, and (3) the plaintiff then fails to file an
10 amended complaint” regardless of whether the case was dismissed with or without prejudice.
11 Harris v. Mangum, 863 F.3d 1133, 1142-43 (9th Cir. 2017).

12 Inspection of other cases filed by plaintiff has led to the identification of at least five cases
13 that qualify as strikes. The court takes judicial notice of the following lawsuits filed by plaintiff:¹

- 14 1. Roberts v. Huckleberry, E.D. Cal. No. 1:18-cv-1237 DAD SAB (complaint dismissed
15 on March 10, 2020, for failure to state a claim (ECF No. 57));
- 16 2. Roberts v. KVSP Investigation Service Unit, E.D. Cal. No. 1:19-cv-1055 AWI SAB
17 (complaint dismissed on November 25, 2019, for failure to state a claim (ECF No.
18 14));
- 19 3. Roberts v. Kern Valley State Prison, E.D. Cal. No. 1:20-cv-0670 DAD HBK
20 ((complaint dismissed with leave to amend for failure to state a claim (ECF No. 15),
21 case dismissed on August 2, 2021, for failure to file an amended complaint (ECF No.
22 31));
- 23 4. Roberts v. California State Prison Sacramento, E.D. Cal. No. 2:20-cv-1068 TLN DMC
24 (complaint dismissed on October 13, 2021, for failure to state a claim (ECF No. 23));

25 ¹ The court “may take notice of proceedings in other courts, both within and without the federal
26 judicial system, if those proceedings have a direct relation to matters at issue.” United States ex
27 rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992)
28 (citation and internal quotation marks omitted) (collecting cases); Fed. R. Evid. 201(b)(2) (court
may take judicial notice of facts that are capable of accurate determination by sources whose
accuracy cannot reasonably be questioned).

1 5. Roberts v. California Department of Corrections and Rehabilitation, E.D. Cal. No.
2 1:21-cv-1514 AWI SAB ((complaint dismissed with leave to amend for failure to state
3 a claim (ECF No. 22), case dismissed on February 28, 2022, for failure to state a claim
4 and failure to file an amended complaint (ECF No. 26)).

5 All of the preceding cases were dismissed well in advance of the March 20, 2023 filing of
6 the instant action, and none of the strikes have been overturned. Therefore, this court finds that
7 plaintiff is precluded from proceeding in forma pauperis unless he is “under imminent danger of
8 serious physical injury.” 28 U.S.C. § 1915(g). To satisfy the exception, plaintiff must have
9 alleged facts that demonstrate that he was “under imminent danger of serious physical injury” at
10 the time of filing the complaint. Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007)
11 (“[I]t is the circumstances at the time of the filing of the complaint that matters for purposes of
12 the ‘imminent danger’ exception to § 1915(g).”); see also, Abdul-Akbar v. McKelvie, 239 F.3d
13 307, 312-14 (3rd Cir. 2001); Medberry v. Butler, 185 F.3d 1189, 1192-93 (11th Cir. 1999);
14 Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998); Banos v. O’Guin, 144 F.3d 883, 885 (5th
15 Cir. 1998).

16 The complaint alleges that the Prison Litigation Reform Act is taking plaintiff’s money so
17 that he is left with nothing in his account. ECF No. 1 at 3. There are no allegations that would
18 demonstrate an imminent risk of serious physical injury at the time of filing, and the undersigned
19 will therefore recommend that plaintiff be required to pay the filing fee in full or have the
20 complaint dismissed.

21 II. Plain Language Summary of this Order for a Pro Se Litigant

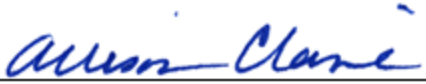
22 You have at least three strikes under § 1915(g) and cannot be granted in forma pauperis
23 status unless you show the court that you were in imminent danger of serious physical injury at
24 the time you filed the complaint. You have not shown that you were in imminent danger of
25 serious physical injury and so it is being recommended that your motion to proceed in forma
26 pauperis be denied and you be required to pay the whole filing fee at one time.

27 Accordingly, IT IS HEREBY ORDERED that the Clerk of the Court shall randomly
28 assign a United States District Judge to this action.

1 IT IS FURTHER RECOMMENDED that plaintiff be ordered to pay the entire \$402.00 in
2 required fees within thirty days or face dismissal of the case.

3 These findings and recommendations are submitted to the United States District Judge
4 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
5 after being served with these findings and recommendations, plaintiff may file written objections
6 with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings
7 and Recommendations." Plaintiff is advised that failure to file objections within the specified
8 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153
9 (9th Cir. 1991).

10 DATED: April 7, 2023

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12 ALLISON CLAIRE
13 UNITED STATES MAGISTRATE JUDGE
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